

In the  
Court of Appeals for the  
Fifth District of Texas at Dallas

**Matthew Joseph Allen**  
Appellant

v.

**The State of Texas,**  
Appellee

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**No. 05-17-00226-CR**

**STATE'S MOTION FOR REHEARING**

The State respectfully requests a rehearing in this case. After this Court's opinion, the State reviewed the facts of this case and has determined that Appellant's rights against double jeopardy were violated when he was convicted of indecency by contact under Count 6 of the indictment and continuous sexual assault of a child under Count 1 of the indictment. The indecency by contact was shown to have occurred within the period of time in which the continuous acts of sexual abuse were alleged to have occurred in the indictment.

The indictment and jury charge in this case alleged that Appellant committed continuous sexual abuse of a child (Count 1) on or about October 1, 2009 through August 15, 2012. CR 19, 231. Count 6 was alleged to have occurred on or about September 25, 2009. CR 20-21, 231. At trial and on appeal, the State relied on the fact that Appellant forced the victim to touch his penis after the family moved back to Texas in December 2011 to support his conviction for indecency by contact

under Count 6 of the indictment. 5 RR 71; *Allen v. State*, No. 05-17-00226-CR, slip op. at 4-5 (Tex. App.—Dallas July 17, 2018). Indeed, this Court relied on that same evidence in holding that the evidence was sufficient to support his conviction for indecency by contact under Count 6 and even modified the judgment to reflect that the offense date for Count 6 was December 2011. *Allen*, slip op. at 4-5. This date is, however, within the period of time in which the continuous sexual abuse was alleged to have taken place. CR 19, 231.

The statute clearly reflects that the Legislature intended to disallow dual convictions for the offense of continuous sexual abuse and for the offenses enumerated as “acts of sexual abuse” when based on the conduct against the same child during the same period of time. *See Price v. State*, 434 S.W.3d 601, 606 (Tex. Crim. App. 2014) (citing Tex. Penal Code §21.02(e)). A defendant charged with continuous sexual abuse who is tried in the same criminal action for an enumerated offense based on conduct committed against the same victim may not be convicted for both offenses unless the latter offense occurred outside the period of time in which the continuous sexual abuse offense was committed. *Id.* Excepting the situation where different periods of time are at issue, a fact finder could find a defendant guilty either of continuous sexual abuse, or, alternatively, an enumerated act of acts of sexual abuse. *See id.*

Because the evidence in this case showed that Appellant committed indecency by contact, which is an enumerated offense, within the time period that the continuous sexual abuse was alleged to have occurred, Appellant's rights against double jeopardy were violated when he was convicted of both offenses.

In this case, the proper remedy is to affirm the conviction for continuous sexual abuse—the most serious offense—and vacate the conviction for indecency by contact. *See Bigon v. State*, 252 S.W.3d 360, 372 (Tex. Crim. App. 2008).

#### **PRAYER**

The State prays that the judgment for continuous sexual abuse (Count 1) be affirmed, and that the indecency by exposure case (Count 2) and the indecency by contact case (Count 6) be reversed and that Appellant be acquitted of those offenses.

Respectfully submitted,

**Greg Willis**  
Criminal District Attorney  
Collin County, Texas

**John R. Rolater, Jr.**  
Asst. Criminal District Attorney  
Chief of the Appellate Division

/s/ Amy Sue Melo Murphy  
**Amy Sue Melo Murphy**  
Asst. Criminal District Attorney  
2100 Bloomdale Rd., Suite 200  
McKinney, TX 75071  
State Bar No. 24041545  
(972) 548-4331  
FAX (214) 491-4860  
asmurphy@co.collin.tx.us

**Certificate of Service**

The State has e-served counsel for Appellant, Marc Fratter, through the eFileTexas.gov filing system and sent a courtesy copy via email to mfratter@yahoo.com, the 14th day of August 2018.

/s/ Amy Sue Melo Murphy  
Amy Sue Melo Murphy  
Assistant Criminal District Attorney

**Certificate of Compliance**

This motion complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this motion, the undersigned attorney certifies that this motion contains 550 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

/s/Amy Sue Melo Murphy

Amy Sue Melo Murphy

Assistant Criminal District Attorney